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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In The Matter of )

Implementation of the )  
Telecommunications Act of 1996: )

Telecommunications Carriers' Use )  
of Customer Proprietary Network )  
and Other Customer Information )

Implementation of the Non-Accounting )  
Safeguards of Sections 271 and 272 of the )  
Communications Act of 1934, as Amended )

CC Docket No. 96-115

CC Docket No. 96-149

REPLY COMMENTS OF THE  
TELECOMMUNICATIONS RESELLERS ASSOCIATION

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## **SUMMARY**

TRA responds herein to recommendations made by other parties regarding safeguards necessary to protect "the competitively-sensitive information of other carriers, including resellers and information service providers, from network providers that gain access to such information through their provision of wholesale services." TRA strongly disagrees with the local exchange carrier ("LEC") commenters' contention that no implementing regulations are necessary to safeguard resale carrier confidential data, that statutory prohibitions against abuse of such data in combination with market forces will ensure network service provider compliance with Sections 222(a) and 222(b). . TRA's resale carrier members were long victimized by abuse of their confidential data by network service providers in the interexchange market; history will soon repeat itself in the local market because, as TRA pointed out in its comments, abuse of resale carrier confidential data tends to increase proportionately with the market share of the network service provider, and indeed, has already begun..

TRA and its resale members fought hard to have the Section 222(a) and 222(b) safeguards incorporated into the Telecommunications Act. TRA urges the Commission in the strongest possible terms not to negate these critical safeguards by failing to adopt adequate implementing regulations. Access restrictions, accompanied by strict liability and serious penalties, are absolutely essential to fulfill the clear Congressional mandate.

<sup>1</sup> Notice, FCC 98-27 at ¶ 206.

I.

**INTRODUCTION**

In its comments, TRA pointed out that Sections 222(a) and 222(b) of the Communications Act of 1934 ("Communications Act"),<sup>2</sup> as amended by the Telecommunications Act of 1996 ("Telecommunications Act"),<sup>3</sup> contain the express prohibitions long sought by resale carriers against abuse by network service providers of the competitively-sensitive data resale carriers are compelled to disclose in order to obtain network services. As TRA explained, unlike most competitors which jealously guard the identity of their customers, treating such information as trade secrets, a resale carrier must voluntarily disclose to its network service provider not only the names, addresses and service locations, but such key marketing data as contact points, for all its subscribers. Moreover, simply by virtue of its provision of network services to the resale carrier, a network service provider has direct access to such additional data as subscriber service requirements, traffic levels and usage patterns. Accordingly, a resale carrier's network service provider is in a position to inflict severe damage on the resale carrier's business if it appropriates and uses in its marketing and sales efforts competitively-sensitive information received from the resale carrier.

Accordingly, TRA urged the Commission to promulgate regulations implementing Sections 222(a) and 222(b) that ensure that a network service provider's retail sales and marketing personnel are not privy to, and do not have access to databases containing, information regarding the subscribers of the network service provider's resale carrier customers. Achieving this goal, TRA emphasized, would require not only effective access restrictions, but incentives significant enough

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<sup>2</sup> 47 U.S.C. §§ 222(a), 222(b).

<sup>3</sup> Pub. L. No. 104-104, 110 Stat. 56, § 702 (1996).

to motivate strict carrier compliance. To accomplish these twin ends, TRA urged the Commission to take three critical steps: First, network service providers should be required to "wall-off" resale carrier confidential data from retail sales and marketing personnel. Second, network service providers must be held to a strict liability standard for abuse of resale carrier confidential data by their employees or agents. And third, the Commission must rigorously enforce the mandates of Sections 222(a) and 222(b) by imposing heavy monetary sanctions for abuse of resale carrier confidential data.

The bulk of the commenting parties argue that no implementing regulations are necessary to safeguard resale carrier confidential data, that statutory prohibitions against abuse of such data in combination with market forces will ensure network service provider compliance with Sections 222(a) and 222(b). TRA strongly disagrees. TRA's resale carrier members were long victimized by abuse of their confidential data by network service providers in the interexchange market; history will soon repeat itself in the local market because, as TRA pointed out in its comments, abuse of resale carrier confidential data tends to increase proportionately with the market share of the network service provider.

TRA and its resale members fought hard to have the Section 222(a) and 222(b) safeguards incorporated into the Telecommunications Act. TRA urges the Commission in the strongest possible terms not to negate these critical safeguards by failing to adopt adequate implementing regulations. Access restrictions, accompanied by strict liability and serious penalties, are absolutely essential to fulfill the clear Congressional mandate.

## II.

### ARGUMENT

#### **A. Adoption of Safeguards Adequate to Prevent Abuse of Carrier Confidential Data by Network Service Providers is Critically Important to Resale Carriers, Particularly Smaller Resale Carriers**

As noted above, a number of incumbent local exchange carriers ("LECs") argue that Sections 222(a) and 222(b) are "self-explanatory" and "need no implementing regulations," urging in fact that "[a]dditional regulation would be redundant."<sup>4</sup> The incumbent LEC commenters variously argue that either market forces or resale carrier prosecutorial efforts will ensure compliance. Thus, it is asserted that "[b]etween the damage to a carrier's reputation and the legal and business consequences associated with a breach of trust, a carrier has substantial incentives to protect carrier, vendor and customer proprietary information."<sup>5</sup> And it is claimed that "[t]he carriers who are the primary beneficiaries of this provision can be expected to be vigilant in protecting their rights through contract terms or complaints or other legal measures."<sup>6</sup>

Moreover, the incumbent LEC commenters argue that "[i]t is time to reject the advocacy of those who would have the Commission treat network providers -- particularly incumbent local exchange carriers ("LECs") -- as criminals before the fact."<sup>7</sup> "[T]he more appropriate policy," it is argued, "is to assume that . . . [network service providers] can understand

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<sup>4</sup> Comments of BellSouth Corporation ("BellSouth") at 4.

<sup>5</sup> Comments of the United States Telephone Association ("USTA") at 5.

<sup>6</sup> Comments of GTE Service Corporation ("GTE") at 5.

<sup>7</sup> Comments of U S WEST, Inc. ("W S WEST") at 6.

straightforwardly drafted statutory provisions and comply with them."<sup>8</sup> Or, as urged by USTA, "the Commission should not presume bad faith and impose a burdensome array of additional safeguards."<sup>9</sup> Indeed, USTA argues, so long as an after-the-fact remedy exists before the Commission or in the Courts, the Commission need take no proactive steps to ensure that resale carrier confidential data is not abused by network service providers.<sup>10</sup>

The suggested reliance upon mere statutory mandates and market forces to prompt compliance by incumbent LECs with the mandates of Sections 222(a) and 222(b) barely passes the "giggle test." It goes without saying that there are precious little market forces at work in the local telecommunications market today. Not only do incumbent LECs generally retain more than 99 percent of the access lines in their local service areas,<sup>11</sup> they are, and will be well into the future, the only source of ubiquitous network facilities in these areas. As the Commission has recognized, a competitive LEC thus "has little or nothing the incumbent LEC needs or wants;" indeed "[b]ecause

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<sup>8</sup> Id.

<sup>9</sup> USTA Comments at 5.

<sup>10</sup> Id.

<sup>11</sup> See, e.g., Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, FCC 97-418, ¶ 22 (released Dec. 24, 1997) ("We recognize that local competition has not developed in South Carolina and other states as quickly as many had hoped. . . . [T]he Department of Justice estimates BellSouth's market share of local exchange in its service area in South Carolina is 99.8% based on access lines"). The U.S. Department of Justice ("Justice Department") concluded that in the State of Louisiana, "actual competitive entry . . . is still extremely limited; BellSouth's market share of local exchange in its service area is about 99.61% based on access lines." Evaluation of the Justice Department filed in CC Docket No. 97-231, Appx. B, p. 3 on December 10, 1997. In Ameritech's "in-region State" of Michigan, the Justice Department calculated that "the aggregate market share of CLECs, measured by total number of access lines statewide using all forms of competition (separate facilities, unbundled loops and resale), appears to be between 1.2% and 1.5%." Evaluation of the Justice Department filed in CC Docket No. 97-137, Appx. B, p. 3 on June 25, 1997.

an incumbent LEC currently serves virtually all subscribers in its local serving area, . . . [it] has little economic incentive to assist new entrants in their efforts to secure a greater share of that market."<sup>12</sup>

In other words, reliance upon market forces to discipline incumbent LEC treatment of resale carrier confidential data would be fool hearty.

Reliance upon mere statutory mandates is no more defensible. Section 251(c) of the Communications Act<sup>13</sup> is a statutory mandate much like Sections 222(a) and 222(b). Rules implementing Section 251(c) have now been in place for nearly two years.<sup>14</sup> Yet no Bell Operating Company ("BOC") has been able to demonstrate to date that it has fully complied with Section 251(c).<sup>15</sup> As the Commission has repeatedly recognized, where carriers have the ability and the incentive to act in an anticompetitive manner, strict regulatory constraints and oversight are warranted. Thus, for example, the Commission in adopting accounting and non-accounting

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<sup>12</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶¶ 10, 15 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd in part, vacated in part sub. nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (1997), *modified* 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997), *cert. granted sub. nom. AT&T Corp. v. Iowa Utilities Board* (Nov. 17, 1997), *pet. for rev. pending sub. nom., Southwestern Bell Telephone Co. v. FCC*, Case No. 97-3389 (Sept. 5, 1997).

<sup>13</sup> 47 U.S.C. § 251(c).

<sup>14</sup> 47 C.F.R. §§ 51.1 *et seq.*

<sup>15</sup> *See, e.g., Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, FCC 97-418; *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 97-231, FCC 98-17 (released Feb. 4, 1998), *appeal pending sub nom. BellSouth Corporation v. FCC*, Case No. 98-1087 (D.C.Cir. Mar. 6, 1998) *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd. 20543 (1997).

safeguards designed to "protect competition in . . . ['competitive markets, such as interLATA services and equipment manufacturing'] from the BOCs' ability to use their existing market power in local exchange services to obtain an anticompetitive advantage in those new markets the BOCs seek to enter," relied upon the ability and the incentives of the BOCs to act contrary to statutory mandates in crafting necessary and appropriate safeguards.<sup>16</sup> Certainly, the mandates of Section 272 of the Communications Act are no less "definitive"<sup>17</sup> or "self-explanatory"<sup>18</sup> than the mandates of Sections 222(a) or 222(b). And given the ability and the incentives of incumbent LECs to abuse resale carrier confidential data, it is no more likely that the mandates of the latter will be any more effective absent implementing regulations than the mandates of the former.

Equally unconvincing are claims that such after-the-fact remedies as the ability to file a formal complaint with the Commission or a suit in federal court are adequate to protect the interests of resale carriers in preserving the confidentiality of proprietary data. First, as the Commission well knows, most resale carriers are relatively small providers and are thereby dwarfed in size and resources by their network service providers, including the BOCs and other large independent incumbent LECs. As the Commission has recognized, the public interest is not well

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<sup>16</sup> Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd. 21905 (1996), *recon.* 12 FCC Rcd. 2297 (1997), *pet. for rev. pending sub nom. SBC Communications Corp. v. FCC*, Case No. 97-1118 (D.C. Cir. Mar. 6, 1997), *remanded in part sub nom. Bell Atlantic Tel. Cos. v. FCC*, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon on remand* FCC 97-222 (released June 24, 1997), *aff'd sub nom Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997); Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996 (Report and Order) 11 FCC Rcd. 17539 (1996)

<sup>17</sup> Comments of GTE at 6.

<sup>18</sup> Comments of BellSouth at 4.

served by requiring "small carriers to expend their limited resources securing . . . right[s] . . . to which they are entitled under the 1996 Act."<sup>19</sup> "[S]mall entities . . . are likely to have less of a financial cushion than larger entities,"<sup>20</sup> and hence are much less likely to be able to afford to litigate to secure redress for abuse of their confidential data by their network service providers. Adjudicatory processes, whether they be regulatory or judicial, always favor larger entities that can better afford to dedicate the resources, the personnel and the funds necessary to prevail on their claims or defenses.

Moreover, relying on after-the-fact remedies is akin to closing the proverbial barn door after the cows have escaped; in other words, the damage has been done and even if can be undone, redress may come too late to help the small carrier. Many resale carriers simply exited the market during the heyday of AT&T abuse of its resale carrier customers' confidential data.<sup>21</sup> While some sought legal and regulatory relief, proving abuse of carrier confidential data, much less quantifying associated damages, proved to be extremely difficult. Among the surviving carriers, many simply could not afford to antagonize their principal source of network services. Ultimately, as competitive alternatives became available, resale carriers simply moved their traffic elsewhere, never obtaining any form of relief.

After-the-fact remedies are generally the refuge of those possessed of market power and significant size and resources. The incumbent LEC commenters know full well that if adequate

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<sup>19</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 61.

<sup>20</sup> Id.

<sup>21</sup> *See* TRA Comments at 4 - 5.

preventive safeguards are not adopted and their resale carrier customers must file complaints or suits to secure relief, incumbent LECs will rarely be called to task, and even more rarely be made to pay, for abuse of resale carrier confidential data. And even in the rare circumstance in which they are ultimately held accountable, the incumbent LECs will have derived the benefits of their anticompetitive conduct while litigation was ongoing.<sup>22</sup>

But the incumbent LEC commenters contend, should not the Commission wait "until there is evidence that carriers are not protecting the confidential information of other carriers"<sup>23</sup> before safeguards are adopted. Or as GTE quaintly opines, "[t]he Commission should discover by experience whether anything is 'broke' before creating rules to 'fix it'."<sup>24</sup> Not, TRA submits, if the Commission is serious regarding its desire to foster local competition and promote the participation by small business in telecommunications. Much of the price competition and service innovation in the interexchange market was driven by resale carriers that identified and courted under-served market niches. As the Commission has recognized, "small businesses are able to serve narrower niche markets that may not be easily or profitably served by large corporations, especially as large telecommunications expand globally."<sup>25</sup> Roughly a third of TRA's resale carrier members are currently reselling, or endeavoring to resell, local service, while in excess of another third are

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<sup>22</sup> Those benefits are not of course limited to the mere appropriation of their resale carrier customers' subscribers, but include distracting competitors and draining their limited resources.

<sup>23</sup> Comments of USTA at 5.

<sup>24</sup> Comments of GTE at 6.

<sup>25</sup> Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), GN Docket No. 96-113, ¶ 6 (1996).

planning to enter the local market within the next 12 months.<sup>26</sup> If these small to mid-sized carriers are to have a competitive impact comparable to that which drove interexchange competition, they cannot spend their limited resources seeking to protect their carrier confidential data.

As to the incumbent LEC commenters' assertion that abuse of resale carrier confidential data is a purely theoretical concern, TRA has already shown that abuse of such information was rampant in the interexchange industry until sufficient competitive options for network services emerged. Other commenters have identified the beginnings of such abuse in the local market. For example, Sprint Corporation ("Sprint") notes that "certain LECs have arrogated for their own marketing use databases containing proprietary long distance customer information furnished . . . by Sprint and other IXC's under billing and collection agreements."<sup>27</sup> MCI Telecommunications Corporation ("MCI") describes another like tactic, noting that "ILECs have tried to escape their duty to protect billing information provided to them by IXC's by claiming that it is actually CPNI, their use of which has been approved by the customer under Section 222(c)(1)."<sup>28</sup> MCI further advises that it has described in other filings in this proceeding "various incumbent local exchange carriers' (ILECs') abuses of carrier information, including billing and carrier selection information."<sup>29</sup> And as succinctly described by Intermedia Communications Inc. (Intermedia"), "as

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<sup>26</sup> Telecommunications Resellers Association, "1997 Reseller Membership Survey and Statistics," pp. 1, 15 (Oct. 1997).

<sup>27</sup> Comments of Sprint at 7.

<sup>28</sup> Comments of MCI at 14.

<sup>29</sup> Id. at 6 - 7.

competition takes hold, ILECs will increasingly lose market share, and the greater the loss of market share, the greater the temptation to use competitor CPNI to 'winback' former ILEC customers."<sup>30</sup>

It is critically important for resale carriers, and particularly for small resale carriers, that the Commission address protection of resale carrier confidential data from a realistic perspective and understand the ramifications of its failure to adopt adequate safeguards. Costs will be incurred no matter which actions the Commission takes. Obviously, if the Commission requires, as TRA has suggested, that network service providers "wall-off" resale carrier confidential data from retail sales and marketing personnel, costs will be incurred implementing the necessary access restrictions. If the Commission declines to do so, the costs of that inaction will be borne by resale carriers in the form of not only lost customers and lost opportunities, but in litigation expenses. Ultimately, these costs will be borne by consumers in the form of benefits lost as a result of reduced competition.

Nor are devices such as electronic use restrictions, personnel training and access documentation legitimate compromises. As TRA emphasized in its comments, such "half-way measures" have proven inadequate in the past to protect resale carrier confidential data. And they will prove inadequate in the future. Incumbent LECs have yet to fully comply with any of the Telecommunications Act's mandates; there is no reason to believe that in this instance their behavior will be exemplary. Anything short of access restrictions, accompanied by strict liabilities and serious penalties, will expose resale carriers to the very conduct that caused them to lobby so hard for the protections embodied in Sections 222(a) and 222(b).

**B. TRA Endorses MCI's and Sprint's Definitional Recommendations**

In its comments, MCI discusses at length the scope of Sections 222(a) and 222(b), and recommends that these provisions be read broadly so that the former subsumes "any proprietary information that one carrier obtains from or learns about another from any source . . . includ[ing] customer information such as CPNI, billing information and confidential information about the carrier's operations and facilities," and the latter "covers any proprietary information that one carrier obtains from another for the purpose of providing a telecommunications service."<sup>31</sup> Sprint recommends that the Commission clarify that Sections 222(a) and 222(b) also reach "information . . . receive[d] from another carrier in the provision of a non-common carrier service," emphasizing that incumbent LECs may not use resale carrier confidential data based upon end-user-approved release of customer proprietary network information ("CPNI").<sup>32</sup> TRA agrees with both commenters that the intent of Congress was to broadly protect the confidentiality of carrier confidential data so as to ensure that network service providers do not obtain unfair competitive advantage by appropriating resale carrier confidential data for their own marketing and sales.

Like Sprint, MCI also distinguishes between CPNI and carrier confidential data. As MCI points out by way of illustration, "where a facilities-based carrier obtains proprietary information from a reseller about the reseller's customer for the purpose of providing service to that customer," the information "would be carrier proprietary information but not CPNI."<sup>33</sup> TRA strongly

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<sup>31</sup> Comments of MCI at 8 - 9.

<sup>32</sup> Comments of Sprint at 7 - 8.

<sup>33</sup> Comments of MCI at 10.

endorses this position. A carrier with no customer/carrier relationship with an end-user or no customer/carrier relationship in a given market, should not be able to use for marketing purposes information pertinent to that end user which it has solely by virtue of its provision of network services to the resale carrier that provides retail services to the end user. Thus, TRA agrees with MCI that, among other things, an end-user's choice of interexchange or local provider "should be viewed as carrier proprietary information under Section 222(b)." <sup>34</sup>

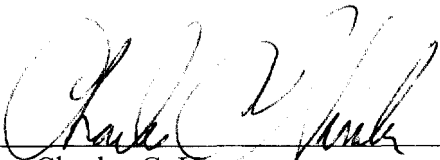
### III.

#### CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to adopt rules and policies in this docket consistent with these reply comments and its previously filed comments.

Respectfully submitted,

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